



**OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN**

**GERALD C. MANN  
ATTORNEY GENERAL**

**Texas National Guard Armory Board  
Room 627 Fort Worth Club Bldg.  
Fort Worth, Texas**

**Dear Sir:**

**Attention: Mr. C. W. Nimon,  
Secretary.**

**Opinion No. O-1761**

**Re: Effective date of initial  
term of members of Texas  
National Guard Armory  
Board, under the provisions  
of S. B. 326, 46th  
Legislature; (2) May a  
member of such Board occupy  
at the same time the  
position of member of the  
Board and the office of  
Executive Secretary of  
the Board?**

By your letter of December 4, 1939, you request the opinion of this department upon the following questions:

1. Under the provisions of Senate Bill 326, passed by the 46th Legislature, General C. V. Birkhead qualified early in May, 1939, for a two-year initial term. You desire to be informed as to the effective date of the initial term of General Birkhead.

2. You refer to the fact that Brigadier General C. W. Nimon, being the Senior Active Officer, will be certified to the Adjutant General for appointment to fill the place by the resignation of General Birkhead. You state that General Nimon now occupies the position of Executive Secretary of the Board. You desire to be informed whether General Nimon can occupy at the same time the position of member of the Texas National Guard Armory Board and the office of Executive Secretary of the Board.

## Texas National Guard Armory Board - Page 2

Senate Bill 326, Acts of the 46th Legislature, regular session, passed by both houses of the Texas Legislature, carried an emergency clause, and both houses of the Legislature, in passing the Act, observed the requirements imposed by Art. 3, Sec. 39, of our Constitution, regarding the passage of emergency measures. The Act, therefore, became effective as a law on May 1, 1939, the date upon which it was approved by the Governor of the State of Texas.

Sec. 1 of S. B. 326 provides as follows:

"There is hereby created the Texas National Guard Armory Board to be composed of five members who shall serve without compensation other than their actual, necessary expenses while traveling on the business of the Board. Those three individuals who are acting as members of the Texas National Guard Armory Board as created and defined by Chapter 386 of the regular session of the 45th Legislature of the State of Texas on the effective date of this Act, together with the Senior Active Officer of the National Guard of Texas, not of the three above-mentioned, and the Senior Cavalry Officer of said Guard, shall constitute the initial membership of the Board created by this Act. Of the three individuals first above mentioned, the oldest shall have the initial term of six years, the next oldest the four year, and the youngest of the three the two year initial term. Of the other two members, the Cavalry Officer shall have the three year term, and the other the one year term. All such initial terms shall date from the date this Act becomes effective. Except as above provided, the terms of membership on said Board shall be of six years duration."

Since the Act became effective on May 1, 1939, the initial terms of the offices of the Texas National Guard Armory Board date from May 1, 1939. A delay in qualifying for the office does not defer the beginning of the "term" of the "office", but merely postpones the filling of the office. The term of the "office" began on May 1, 1939; but the term of the "officer", Gen. Birk-

head, began when he qualified to act as such "officer" for the balance of the term of the "office"

The Act, in prescribing the powers and duties to be exercised by the Board, provides, in Sec. 2, Subsection (d), that the Board shall have the power:

"To appoint, employ and pay and dismiss an Executive Secretary, and, also, such other officials, counsel, lawyers, agents and employees as may be necessary to carry out the objects, purposes and duties of the Board, and to prescribe their duties and fix their compensation."

S. B. 427, Acts of the 46th Legislature, regular session, the Departmental Appropriation Bill, provides the following item of appropriation for the Texas National Guard Armory Board:

"1. Secretary . . . . . \$2400.00"

Answering your second question, we quote from our opinion No. 0-410, of date March 15, 1939, as follows:

"The general rule touching on the subject in question, in the absence of statutes bearing on the same, is set forth in Vol. 48, p. 940, C. J., as follows:

"It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified from appointment to the offices to which they may appoint; nor can an appointing board appoint one of its members to an office, even though his vote is not essential to a majority in favor of his appointment, and although he was not present when the appointment was made, and notwithstanding his term in the appointing body was about to expire; nor can the results be ac-

accomplished indirectly by his resignation with the intention that his successor shall cast his vote for him."

"Holding that a county judge was not eligible to accept compensable employment as attorney for the county of which he was judge, the Supreme Court in *Ehlenger v. Clark*, 8 S.W. (2) 666, said:

"It is because of the obvious impossibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint. 29 Cyc. 1381; 22 R.C.L. 414, Sec. 56."

Sec. 1 of S. B. No. 326 provides that the members of the Texas National Guard Armory Board shall serve without compensation other than their actual, necessary expenses while traveling on the business of the Board. Sec. 2 of the above Act, Subsection (d), authorizes the Board to appoint, employ and pay and dismiss an Executive Secretary. There is nothing in the Act indicating that the Legislature intended to authorize the Armory Board to appoint and employ one of its own members to serve as Executive Secretary, so that the rule of law and the authorities cited in the above quotation applies with full force.

In answer to your second question, therefore, you are advised that General Nixon cannot occupy at the same time the position of member of the Texas National Guard Armory Board and the office of Executive Secretary of said Board.

Very truly yours

ATTORNEY GENERAL OF TEXAS

REF-MR APPROVED DEC 13, 1939 BY

*General Mann*

ATTORNEY GENERAL OF TEXAS

*R. W. Fairchild*

R. W. Fairchild  
Assistant

